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*Counsel for Plaintiff*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Clarence Wayne Dixon,  
  
Plaintiff,  
  
vs.

The Arizona Department of Corrections,  
Rehabilitation & Reentry (ADCRR);  
David Shinn, Director of the Arizona  
Department of Corrections,  
Rehabilitation & Reentry; James Kimble,  
Warden, ASPC – Eyman,

Defendants.

No. CV-22-00743-PHX-DJH (JFM)

DEATH-PENALTY CASE

**REPLY IN SUPPORT OF  
EMERGENCY MOTION FOR  
TEMPORARY RESTRAINING  
ORDER OR PRELIMINARY  
INJUNCTION AND  
MEMORANDUM IN SUPPORT**

**Introduction**

Plaintiff Clarence Wayne Dixon hereby replies to the Opposition filed by Defendants. (ECF No. 27.) Plaintiff is seeking a temporary restraining order and/or a preliminary injunction to prevent the State from executing him using expired compounded pentobarbital in violation of the written execution protocol. Plaintiff seeks injunctive relief to prevent Defendants from executing him in a manner that will deprive

1 him of his right to Due Process under the Fourteenth Amendment to the United States  
2 Constitution and in violation of his right to be free from cruel and unusual punishment  
3 under the Eighth Amendment to the United States Constitution.

4 As an initial matter, Plaintiff has sought to come to agreement that would resolve  
5 the issues in this lawsuit. This evening, May 8, 2022, counsel for Plaintiff emailed  
6 counsel (Ex. 1.), offering the following terms:

- 7 a. The compounding pharmacist will compound a new batch of drugs  
8 tomorrow, consistent with what was stated in Defendants' Opposition  
9 filed this afternoon, May 8, 2022;
- 10 b. The pharmacist will provide a declaration (identity redacted) that states  
11 the date of compounding and the storage conditions;
- 12 c. The result of the "quantitative" analysis for this batch of drugs will be  
13 provided to Plaintiff's counsel before the drug is used to carry out his  
14 execution; and
- 15 d. This settlement does not constitute a waiver for any other prisoner who  
16 faces a future execution date of the entitlement to the "quantitative"  
17 analysis within the time frames set forth under the protocol.

18 At the time of filing, counsel for Defendants has not responded.

19 **A. Plaintiff Is Likely to Succeed on the Merits.**

20 Plaintiff is likely to succeed on the merits of Claims 1 and 2 in the amended  
21 complaint. First, Plaintiff has demonstrated that Defendants have created a protected  
22 liberty interest. Second, he has demonstrated an intolerable risk of Eighth Amendment  
23 harm. And third, he has demonstrated that the compounded pentobarbital is expired, in  
24 support of both claims.

25 **1. Defendants have created a protected liberty interest.**

26 Defendants have written a protocol that prohibits them from using expired drugs  
27 in an execution. ADCRR DO 710, Attach. D at A.1.III. They have confirmed that  
28 obligation in the Arizona Supreme Court. (Amend. Compl. at ¶¶ 31-32.) Defendants now  
claim, however that "[a]lthough Defendants' execution protocol makes clear they will  
not use any drug that is past its BUD, it purports to create no procedural right to challenge

1 an expiration date or BUD assigned to the drug that will be used in an execution.”  
 2 (Opposition Pl.’s Mot. Prelim. Injunction or TRO, ECF 27 at 10 (“Opposition”).)

3 This is incorrect. Defendants are under the dictates of a court-sanctioned  
 4 settlement agreement that expressly forbids them from attempting to disclaim  
 5 enforceable rights through the protocol. According to the settlement agreement:

6 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the  
 7 parties intend, that Defendants and the ADC will remove from the ADC’s  
 8 current execution procedures the sentence—“[t]his Department Order  
 9 outlines internal procedures and does not create any legally enforceable  
 10 rights or obligations”—and that Defendants and the ADC will never again  
 include such language or substantially similar language in any future version  
 of the ADC’s execution procedures (together, “Covenant No. 1”);

11 Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claims Six and  
 12 Seven, *First Amend. Coal. v. Ryan*, No. 2:14-cv-01447-NVW (D. Ariz.), filed June 21,  
 13 2017, ECF 186 at 2-3 (Ex. 2); *see also* Order for Dismissal of Claims Six and Seven, *id.*  
 14 filed June 22, 2017, ECF 187 at 2 (Ex. 3) (detailing “Prohibited Conduct[,]” including  
 15 ADCRR “intend[ing] to engage in or hav[ing] actually engaged in any of the following  
 16 conduct... adopt[ing] language in any future version of the ADC’s execution procedures  
 17 that purports to disclaim the creation of rights or obligations[.]”).

18 Consequently, DO 710’s requirement to use non-expired drugs *does* create a  
 19 protected liberty interest, *contra* Opposition at 8-9—in fact, it does so precisely because  
 20 the requirement is a procedure that Defendants must follow.<sup>1</sup> Plaintiff has a freestanding  
 21 due process liberty interest created directly by Defendants’ protocol, and he is entitled to  
 22 protection from being executed in violation of that liberty interest.

23 The Fourteenth Amendment prohibits a state from depriving “any person of life,  
 24 liberty, or property, without due process of law.” U.S. Const. amend XIV. This due  
 25

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26 <sup>1</sup> Defendants also assert that Plaintiff “does not even contend that ADCRR’s protocol  
 27 violates state law, only that the protocol (which is not law) will be violated.... Surely an  
 28 alleged violation of a protocol that is not law” cannot create a protected liberty interest.  
 (Opposition at 8.) But as Plaintiff explains above, the settlement agreement by which  
 Defendants are bound prohibits Defendants from claiming that Plaintiff does not have  
 rights under the protocol.

1 process right, “the touchstone” of which “is protection of the individual against arbitrary  
2 action of government,” *Wolff v. McDonnell* 418 U.S. 539, 558 (1974), requires “the  
3 opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v.*  
4 *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo* 380 U.S. 545, 552  
5 (1965)).

6 2. The protocol imposes mandatory requirements on Defendants.

7 Defendants assert that the language in their protocol is “merely a procedure to be  
8 followed” (Opposition at 8-9), rather than a mandatory requirement. Defendants  
9 misapprehend the direct language of their own protocol. The protocol’s language states:  
10 “ADC will only use chemicals in an execution that have an expiration or beyond-use date  
11 that is after the date that an execution is carried out.” This language is precisely that of  
12 the type that provides “specific directives to the decisionmaker [, such] that if the  
13 regulations’ substantive predicates are present, a particular outcome must follow.”  
14 (Opposition at 7 (quoting *Rodriguez v. McLoughlin*, 214 F.3d 328, 338 (2d Cir. 2000).)  
15 The language of the protocol directly provides the Court with the “relevant mandatory  
16 language[,]” (Opposition at 7): if the drug is expired, Defendants cannot use it to execute  
17 Plaintiff.

18 Moreover, Plaintiff does not seek “needless formality” (Opposition at 7); rather,  
19 the protocol’s prohibition against using expired drugs is a recognition of the safety  
20 requirements inherent in the existence of expiration dates. *See, e.g.*, Not. Beyond Use  
21 Date, ECF 14-1, Ex. 1, doc. page 2 (Defendants’ pharmacist using laboratory testing in  
22 order to establish [the compounded pentobarbital’s] Beyond Use Date.”) Because  
23 beyond that date, there is no assurance the drug will work as intended. *See, e.g.*, Almgren  
24 Supplemental Report ¶ 17 (describing the importance of the pH level: “[t]he pH is crucial  
25 because the wrong pH can result in formation of precipitant, leading to reduction or loss  
26 of pharmacological activity of the drug.); ¶ 20 (explaining that the presence of certain  
27 microorganisms can lead to unpredictable pharmacological activity).

1 Plaintiff's interest in holding Defendants to the safety-based aspects of their  
2 protocol is *not* a formality. In fact, Defendants misunderstand the right that Plaintiff seeks  
3 to vindicate, as well as the safety-based nature of his request. They claim that he does not  
4 have authority for "a procedural right to challenge the BUD provided by Defendants."  
5 (Opposition at 9.) They attempt to support this claim by asserting that Plaintiff would not  
6 be "entitled to obtain information documenting how the manufacturer arrived at a  
7 particular expiration date" (Opposition at 9) if Defendants were using a manufactured  
8 drug. But Plaintiff is not arguing for a right to challenge the BUD; rather, he has a right  
9 not to be executed with an expired drug. And he has already obtained information from  
10 Defendants' pharmacist indicating that the drug is expired. He is not challenging the  
11 BUD: he is challenging the use of expired drugs. If Defendants were using manufactured  
12 pentobarbital, that drug would already have an expiry that meets stringent regulations  
13 established by the federal Food and Drug Administration. Plaintiff would have no need  
14 to challenge the expiry itself. The expiry would either be before the date of Plaintiff's  
15 execution, or it would be after. If the expiry of the manufactured drug were before the  
16 date of Plaintiff's execution, he would challenge the ability of Defendants to use that  
17 drug—just as he is doing here.

18 Additionally, Defendants fundamentally misunderstand due process. Defendants  
19 claim that the disclosure of its protocols cannot create a due process right. (Opposition at  
20 9 (citing *Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013) for the proposition that  
21 because a state's *withholding* of an execution protocol does not create a due-process right,  
22 if a state provides the protocol, then similarly no right is created).)

23 But that is not the law. Rather, when the State "create[s]" a right for prisoners,  
24 "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth  
25 Amendment 'liberty' to entitle him to those minimum procedures appropriate under the  
26 circumstances and required by the Due Process Clause to insure that the state-created  
27 right is not arbitrarily abrogated." *McDonnell*, 418 U.S. at 557. Defendants have created  
28 a liberty interest in their published protocol—confirmed by the settlement agreement

1 relating to that protocol, *see e.g., First Amend. Coal.*, No. 2:14-cv-01447-NVW, at ECF  
2 186. They cannot now claim that such a right does not exist. This is what distinguishes  
3 Plaintiff's situation from the cases cited by Defendants.

4 3. Eighth Amendment.

5 The fact that this freestanding due process liberty interest also has Eighth  
6 Amendment implications does not diminish the underlying due process right that  
7 Defendants' protocol establishes. That is, Plaintiff's Eighth Amendment claims are *in*  
8 *addition* to his liberty interest in the protocol's provision against the use of expired drugs.  
9 He does not rely on the Eighth Amendment as the underlying source of his claim; his  
10 claim does not rely on a "specific constitutional provision, such as the...Eighth  
11 Amendment" (Opposition at 8); rather, he seeks to vindicate a *separate* claim under the  
12 Eighth Amendment.

13 That is, if he is executed with expired drugs, in violation of DO 710, he faces a  
14 substantial risk of serious harm, in violation of the Eighth Amendment.

15 The Eighth Amendment forbids the Government, in carrying out a death sentence,  
16 from inflicting pain beyond that necessary to end the condemned prisoner's life.  
17 *Kemmler*, 136 U.S. at 447. "Punishments are cruel when they involve torture or a  
18 lingering death . . . something more than the mere extinguishment of life." *Id.* A method  
19 of execution violates the Eighth Amendment if it presents a "substantial risk of serious  
20 harm." *Baze v. Rees*, 553 U.S. 35, 50 (2008) Plaintiff must also plead and identify an  
21 alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a  
22 substantial risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (internal  
23 quotation omitted).

24 The use of an expired execution drug presents a substantial risk of serious harm  
25 due to the risk of sub-potency, degradation, lack of sterility, the presence of toxins and  
26 inappropriate pH levels, among other problems. Plaintiff's compounding expert stated  
27 that expired execution drugs can have "unpredictable effects such as lower than expected  
28 pharmacological activities, formation of precipitate leading to extreme pain and suffering

1 upon administration.” Almgren Report at ¶ 21. Specifically, the wrong pH can cause  
2 severe pain upon administration. Almgren Supp. Report at ¶ 17. Additionally, if the drugs  
3 are subpotent as a result of being used beyond the expiration date, it “will lead to  
4 inadequate pharmacological effects and prolonged suffering of the prisoner.” *Id.* at 28.

5 Defendants have offered no expert testimony to rebut this information. Rather than  
6 relying on their pharmacist—who required stability testing, limited though it was, to be  
7 conducted—Defendants rely only on unsubstantiated statements that, *e.g.*, the drug has  
8 not suffered degradation in the six weeks since the stability tests concluded. (Opposition  
9 at 10.)

10 Plaintiff is of an advanced age and suffers from declining health and is at an  
11 increased risk that subpotent or otherwise compromised drugs will cause unconstitutional  
12 suffering during his execution. Plaintiff suffers from documented heart and lung disease  
13 that will already alter the way the drugs are delivered and circulate through his system  
14 and it will take longer for the drug to take full effect. *See* Cuccinelli Dec. at 9. Plaintiff  
15 also suffers from liver damage which will slow the rate that he metabolizes the drug,  
16 again slowing the effect. *Id.* If the drug is subpotent as a result of being expired, the drug  
17 will take even longer to reach full effect as a result of Plaintiff’s medical condition, which  
18 puts him at grave risk of a “lingering death.” *Kemmler*, 136 U.S. at 447.

19 Defendants have not disputed compounded pentobarbital that does not meet the  
20 pH value required by the USP monograph can lead to precipitates that can cause severe  
21 tissue damage and thromboembolism, Almgren Supp. Rep. ¶ 13, or that “[t]he pH is  
22 crucial because the wrong pH can result in formation of precipitate, leading to reduction  
23 or loss of pharmacological activity of the drug. It can also cause tissue irritation and  
24 damage, causing severe pain when infused” *id.* at ¶17. Defendants also do not dispute  
25 that Plaintiff has offered a feasible, readily available alternative: that Defendants follow  
26 the safety provision of their own protocol, which requires them to use unexpired drugs.

1           4.   The drugs are expired.

2           Plaintiff has demonstrated that the compounded pentobarbital does not meet the  
3 “client provided specifications” (Not. Beyond Use Date, ECF 14-1, Attach. 2, doc. page  
4 13) that Defendants’ pharmacist “provided to a FDA registered laboratory for stability  
5 testing[.]” The pharmacist, who is “aware of and follow[s] the guidelines and  
6 requirements found in the United States Pharmacopeia[.]” (Not. Beyond Use Date, ECF  
7 14-1, Ex. 1, doc. page 2), requested that the lab engage in testing using USP standards.

8           The results of those tests demonstrate that the drug does not meet the requirements  
9 for pH. After Plaintiff pointed out this fact, Defendants now assert that Plaintiff argues  
10 solely on the basis of the pH value that the drug is expired. (Opposition at 5.) And they  
11 claim that the pH value is irrelevant. (Hr’g Tr. May 7, 2022, at 11.)

12           In other words, now that the drug has failed one of the tests *that their pharmacist*  
13 *required*, they assert that the test itself is superfluous. (Opposition at 10 (stating that  
14 “Defendants’ pharmacist apparently requested more testing than is necessary to  
15 determine the BUD . . .”).) But Defendants cannot disavow the requirements that their  
16 pharmacist required when submitting the compounded pentobarbital to the laboratory  
17 “for stability testing in order to establish the solution’s Beyond Use Date.” (Not. Beyond  
18 Use Date, ECF 14-1, Ex. 1, doc. page 2.)

19           Indeed, the pharmacist did not say that they submitted the sample for “more testing  
20 than is necessary to determine the BUD[.]” (Opposition at 10.) Rather, the pharmacist—  
21 who “follow[s] the guidelines and requirements” of the USP—understands what is  
22 required for stability testing, and therefore required that of the laboratory.

23           And what is required for stability testing is agreed and laid out in detail by Dr.  
24 Almgren. One of the requirements is pH testing—which the laboratory conducted  
25 according to specifications provided by the client—*i.e.*, the pharmacist. Defendants’  
26 pharmacist understands that pH testing is required. Dr. Almgren agrees. Almgren Rep. ¶  
27 28; Almgren Supp. Rep. ¶ 17.

1 But Plaintiff has not based his claim solely on the failure of the drug to meet the  
2 required pH value—the fact that the drug is expired is not just related to the pH, which  
3 falls outside of the acceptable range. Instead, he explains that many other necessary  
4 aspects of stability testing are missing. As Dr. Almgren has meticulously detailed,  
5 stability tests require many components that are not included as part of Defendants’  
6 stability testing. Almgren Supp. Rep. ¶¶ 6-11. That those components are missing  
7 indicates that Defendants’ BUD is not supportable. The failure of the drug to meet the  
8 pH standard merely confirms that fact.

9 Thus, what Plaintiff has demonstrated is this: on the basis of the *limited*  
10 information that Defendants have produced, the compounded drug *does not pass* the USP  
11 monograph for compounded pentobarbital. That fact is sufficient to prohibit Defendants  
12 from using the compounded pentobarbital in Plaintiff’s execution.

13 Moreover, Defendants misunderstand stability testing. They claim that “there are  
14 no risks of ‘sub-potency’ or ‘degradation’...because the Pentobarbital Sodium Assay test  
15 results showed that the compounded pentobarbital fell within the 92.0–108.0%  
16 requirements up to 180 days from initial testing.” (Opposition at 10.)

17 But those tests were completed more than a month ago (Not. Beyond Use Date,  
18 ECF 14-1, Attach. 12 doc. page 13), and the drug failed one of the requirements. The  
19 point of a stability test is to determine whether a drug’s BUD can be extended. If the drug  
20 fails on a requirement, it is improper to assert that because one standard was acceptable  
21 at the time that another failed, one can extrapolate beyond the time of the stability test to  
22 claim that the drug will be acceptable at some later time. *See, e.g.*, Almgren Rep. ¶ 30  
23 (“If a drug fails *any of the specified quality testing* it should not be used because the  
24 quality of the drug may be subpar and pharmacological activity is not predictable.  
25 *Instead, it should be investigated to determine why the failure in quality occurred.*”  
26 (emphasis added).)

27 In other words, the drug failed at the end of March; it is not scientifically  
28 supportable to assert that it will retain its pharmacological properties beyond that date—

1 much less through the date of Plaintiff's execution, which is six weeks beyond the final  
2 testing date.

3 5. Plaintiff Was Not Dilatory.

4 Plaintiff has been seeking this information for more than a year. Defendants had  
5 a compounded drug on February 26, 2022. (Not. Beyond Use Date, ECF 14-1, Ex. 1, doc.  
6 page 2.) Thus, Defendants have had the specific drug that they intend to use in Plaintiff's  
7 execution for six weeks. Plaintiff has been seeking information about the specific drug  
8 intended for his execution since March 4, 2022. (Compl. ¶ 41.)<sup>2</sup> At the time he made that  
9 request, the intended drug had been in existence for seven days. Nevertheless, Defendants  
10 provided no information. (As Plaintiff describes in his amended complaint, ¶ 65, at the  
11 time Defendants informed the Arizona Supreme Court that the BUD was at least 90 days  
12 from the date of compounding, the limited stability testing had not been completed and  
13 would not be until a month after the drug had been compounded.)

14 Plaintiff would have litigated any issues necessary to the execution drug supply  
15 once the limited stability tests were completed at the end of March. (Not. Beyond Use  
16 Date, ECF 14-1, Attach. 12 doc. page 13.) But he did not have the results of the limited  
17 stability tests until two days ago—when Defendants provided them under a court order  
18 (Order, ECF 12, May 6, 2022).

19 Defendants cannot use the delay they themselves created and maintained over the  
20 course of the last 14 months to argue that Plaintiff has not been diligent.

21 **B. Plaintiff meets the other factors for obtaining a TRO and/or a Preliminary**  
22 **Injunction.**

23 For the reasons stated below, Plaintiff meets the other factors for obtaining a TRO  
24 or a preliminary injunction.

25 1. Plaintiff Will Suffer Irreparable Harm If an Injunction Is Not Granted.

26 Contrary to what Defendants argue, Plaintiff will suffer irreparable harm if he is  
27 executed in violation of his right to due process and his rights under the Eight

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28 <sup>2</sup> Plaintiff began seeking documentation about Defendants' drug supply in March 2021.  
(Compl. ¶ 45.)

1 Amendment. Plaintiff has done more than simply allege imminent harm; he has  
 2 demonstrated it. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th  
 3 Cir. 1988).

4 The “Stability Study Summary Report,” establishes that the BUD cannot be  
 5 extended and the drugs are expired. Defendants now claim the test that the drug failed  
 6 was not necessary, but that is contrary to the statement that their pharmacist follows the  
 7 USP and the reports filed by Plaintiff’s expert who opines that pH is one of the most  
 8 important factors to test for. (Almgren Supplemental Rep. ¶ 17.)

9 Plaintiff will suffer harm as a matter of law. *See Goldie’s Bookstore, Inc. v. Super.*  
 10 *Ct. of Calif.*, 739 F.2d 466, 472 (9th Cir. 1984) (“[a]n alleged constitutional infringement  
 11 will often alone constitute irreparable harm.”). Additionally, as discussed above, the use  
 12 of an expired drug creates a substantial risk that Plaintiff will suffer a “lingering death.”  
 13 *In re Kemmler*, 136 U.S. 436, 447 (1890).

14 2. The Balance of Equities and Public Interest Support a Preliminary  
 15 Injunction.

16 The third and fourth preliminary injunction factors, the balance of the equities and  
 17 public interest factors, also weigh in Plaintiff’s favor.

18 As discussed above, Plaintiff did not delay in seeking to vindicate his  
 19 constitutional rights and filed suit as soon as the information was provided to him that  
 20 demonstrates the threatened violations. Defendants have been in control over this process  
 21 and timeline. Defendants sought Plaintiff’s execution before they had data to support  
 22 extending the BUD. Defendants delayed in providing information about that data to  
 23 Plaintiff until the last minute. If there is any delay here it is on the part of Defendants.

24 Additionally, no public interest is served by executing Plaintiff in violation of his  
 25 constitutional rights. *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). “It is  
 26 always in the public interest to prevent the violation of a party’s constitutional rights.”  
 27 *Calif. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th  
 28 Cir. 2022) (alterations and internal quotation marks omitted). If Defendants are going to

1 carry out Plaintiff's execution, they must do so in a manner that comports with the  
2 requirement in the written protocol and the U.S. Constitution.

3 **Conclusion**

4 Because Plaintiff can demonstrate a likelihood of success on the merits of his  
5 claims, and because the other factors tip in his favor, this Court should grant a TRO  
6 and/or preliminary injunction to prevent Defendants' ongoing violation of his  
7 Constitutional rights.

8 Respectfully submitted this 8th day of May, 2022.

9  
10 Jon M. Sands  
11 Federal Public Defender  
12 District of Arizona

13 Jennifer M. Moreno  
14 Therese M. Day  
15 Amanda C. Bass  
16 Assistant Federal Public Defenders

17 s/ Jennifer M. Moreno  
18 Counsel for Plaintiff  
19  
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**Certificate of Service**

I hereby certify that on May 8, 2022, I electronically filed the foregoing Reply in Support of Emergency Motion for Temporary Restraining Order or Preliminary Injunction and Memorandum in Support with the Clerk's Office using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Kat Esparza  
Assistant Paralegal  
Capital Habeas Unit

# EXHIBIT 1

**From:** [Jennifer Moreno](#)  
**To:** ["Sparks, Jeffrey"](#)  
**Subject:** Dixon  
**Date:** Sunday, May 8, 2022 10:54:00 PM

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Good Evening Mr. Sparks,

Apologies for this late email, I have been on a flight this evening. I am writing in response to the Response filed by Defendants this afternoon to see if they would be amenable to the below terms in order to resolve the pending issues in our case.

- The compounding pharmacist would compound a new batch of drugs tomorrow, consistent with what was stated in Defendants' Response filed this afternoon, May 8, 2022.
- The pharmacist will provide a declaration (identity redacted) that states the date of compounding and the storage conditions.
- The result of the "quantitative" analysis for this batch of drugs would be provided to Plaintiff's counsel before the drug is used to carry out his execution.
- This would not be a waiver for any other prisoner who faces a future execution date of the entitlement to the "quantitative" analysis within the time frames set forth under the protocol.

Thank you,  
Jen Moreno

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# EXHIBIT 2

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Counsel for Defendants  
[additional counsel listed on signature page]

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

First Amendment Coalition of Arizona, Inc.;  
Charles Michael Hedlund; Graham S.  
Henry; David Gulbrandson; Robert Poyson;  
Todd Smith; Eldon Schurz; and Roger  
Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC; James  
O'Neil, Warden, ASPC-Eyman; Greg Fizer,  
Warden, ASPC-Florence; and Does 1-10,  
Unknown ADC Personnel, in their official  
capacities as Agents of ADC,

Defendants.

Case No. 2:14-cv-01447-NVW-JFM

**STIPULATED SETTLEMENT  
AGREEMENT AND [PROPOSED]  
ORDER FOR DISMISSAL OF  
CLAIMS SIX AND SEVEN**

1 Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert  
2 Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, “Plaintiffs”), and  
3 Defendants Charles L. Ryan, Director of the Arizona Department of Corrections (“ADC”);  
4 James O’Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–Florence  
5 (collectively, “Defendants”), hereby stipulate and agree as follows:

6 **WHEREAS**, on December 22, 2016, this Court entered an Order for Dismissal of  
7 Claim One (ECF No. 155) based on the December 19, 2016 Stipulated Settlement  
8 Agreement (ECF No. 152) between Plaintiffs and Defendants (collectively, the “parties”);

9 **WHEREAS**, Claim Six and Claim Seven of Plaintiffs’ Second Amended  
10 Complaint (“SAC”) (ECF No. 94) and Plaintiffs’ Supplemental Complaint (ECF No. 163)  
11 challenge the ADC’s reservations of excessive discretion in its execution procedures, and  
12 Defendants’ past and proposed future exercises of that discretion, including through “last-  
13 minute deviations from critical aspects of its announced execution process,” May 18,  
14 2016, Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss SAC at  
15 13 (ECF No. 117), as violative of the Eighth and Fourteenth Amendments;

16 **WHEREAS**, Defendants intend to resolve the deficiencies Plaintiffs allege  
17 through their permanent repudiation of certain provisions contained in past versions of the  
18 ADC’s execution procedures, as set forth herein, and through the adoption of a new set of  
19 execution procedures reflecting those changes;

20 **WHEREAS**, Defendants’ execution procedures have, in the past, stated that “[t]his  
21 Department Order outlines internal procedures and does not create any legally enforceable  
22 rights or obligations,” *e.g.*, Ariz. Dep’t of Corr., Dep’t Order 710, at p.1 (Jan. 11, 2017);

23 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties  
24 intend, that Defendants and the ADC will remove from the ADC’s current execution  
25 procedures the sentence—“[t]his Department Order outlines internal procedures and does  
26 not create any legally enforceable rights or obligations”—and that Defendants and the  
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1 ADC will never again include such language or substantially similar language in any  
2 future version of the ADC's execution procedures (together, "Covenant No. 1");

3 **WHEREAS**, Defendants' execution procedures have, in the past, granted the  
4 Director of the ADC (the "ADC Director") the discretion to change any of the timeframes  
5 set forth in the execution procedures based on the ADC Director's determination that there  
6 has been an "unexpected or otherwise unforeseen contingency," *e.g.* Ariz. Dep't of Corr.,  
7 Dep't Order 710 ¶ 1.1.2.3 (Jan. 11, 2017);

8 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties  
9 intend, that the ADC Director shall henceforth have the authority to change timeframes  
10 relating to the execution process only when those timeframes correspond to minor or  
11 routine contingencies not central to the execution process; that timeframes that *are* central  
12 to the execution process include, but are not limited to, those relating to execution  
13 chemicals and dosages, consciousness checks, and access of the press and counsel to the  
14 execution itself; and that Defendants and the ADC will never again include provisions in  
15 any version of the ADC's execution procedures that purport to expand the ADC Director's  
16 discretion to deviate from timeframes set forth in the execution procedures beyond those  
17 relating to minor or routine contingencies not central to the execution process (together,  
18 "Covenant No. 2");

19 **WHEREAS**, Defendants' execution procedures have, in the past, granted the ADC  
20 Director the discretion to change the quantities or types of chemicals to be used in an  
21 execution at any time that he determines such a change to be necessary, even after a  
22 warrant of execution has been sought, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D  
23 ¶ C.6 (Jan. 11, 2017);

24 **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties  
25 intend, that the ADC Director shall henceforth have the authority to change the quantities  
26 or types of chemicals to be used in an execution after a warrant of execution has been  
27 sought only if the Director, the ADC, Defendants, and/or their counsel, (1) notify the  
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condemned prisoner and his/her counsel of the intended change, (2) withdraw the existing warrant of execution, and (3) apply for a new warrant of execution; and that Defendants and the ADC will never again include provisions in any version of the ADC’s execution procedures that permit the ADC Director or the ADC to change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought without also withdrawing and applying through counsel for a new warrant of execution (together, “Covenant No. 3”);

**WHEREAS**, Defendants’ execution procedures, in the past, have not expressly limited the ADC Director’s discretion regarding the use of quantities and types of chemicals to only those quantities and types of chemicals set forth in the ADC’s execution procedures;

**WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties intend, that the ADC Director’s discretion to choose the quantities and types of chemicals for an execution shall be limited to the quantities and types of chemicals set forth expressly in the then-current execution procedures; that the quantities or types of chemicals that may be used in an execution may be modified only through the formal publication of an amended set of execution procedures; and that any future version of execution procedures will expressly reflect this limitation of discretion (together, “Covenant No. 4”);

**WHEREAS**, Defendants’ execution procedures, in the past, have required that, if any compounded chemical is to be used in an execution, the ADC shall obtain it from only a “certified or licensed” compounding pharmacist or compounding pharmacy, but the ADC’s most recent version of its execution procedures has removed that limitation in lieu of a requirement that the ADC provide a “qualitative analysis of any compounded or non-compounded chemical to be used in the execution . . . within ten calendar days after the state seeks a Warrant of Execution,” *compare* Ariz. Dep’t of Corr., Dep’t Order 710, Att. D ¶ C.2 (Oct. 23, 2015), *with* Ariz. Dep’t of Corr., Dep’t Order 710, Att. D ¶ C.2 (Jan. 11, 2017);

1           **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties  
2 intend, that the ADC shall provide, upon request and within ten (10) calendar days after  
3 the State of Arizona seeks a warrant of execution, a quantitative analysis of any  
4 compounded or non-compounded chemical to be used in an execution that reveals, at a  
5 minimum, the identity and concentration of the compounded or non-compounded  
6 chemical; that ADC will only use chemicals in an execution that have an expiration or  
7 beyond-use date that is after the date that an execution is to be carried out; that, if the  
8 chemical's expiration or beyond-use date states only a month and year (*e.g.*, "May 2017"),  
9 ADC will not use that chemical after the last day of the month specified; and that all future  
10 versions of the ADC's execution procedures shall include these requirements (together,  
11 "Covenant No. 5");

12           **WHEREAS**, Defendants' execution procedures have, in the past, permitted the use  
13 of a three-drug lethal-injection protocol using: (1) a barbiturate or a benzodiazepine as the  
14 first drug, (2) a paralytic such as vecuronium bromide, pancuronium bromide, or  
15 rocuronium bromide (collectively, "Paralytic") as the second drug, and (3) potassium  
16 chloride as the third drug; *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.2 at Chart  
17 C (Jan. 11, 2017);

18           **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties  
19 intend, that Defendants and the ADC will never again use a Paralytic in an execution; and  
20 that Defendants and the ADC consequently will remove their current three-drug lethal-  
21 injection protocol from the current and any future version of the ADC's execution  
22 procedures (together, "Covenant No. 6");

23           **WHEREAS**, Defendants' execution procedures have, in the past, provided for  
24 prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own  
25 execution, *e.g.*, Ariz. Dep't of Corr., Dep't Order 710, Att. D ¶ C.1 (Jan. 11, 2017);

26           **WHEREAS**, Defendants hereby represent, covenant, and agree, and the parties  
27 intend, that Defendants and the ADC shall remove from the ADC's execution procedures  
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1 any provision that purports to permit prisoners or their agents to purchase and/or supply  
2 chemicals for use in the prisoner's own execution, and that Defendants and the ADC will  
3 never again include any such provision or any substantially similar provision in any future  
4 version of the ADC's execution procedures (together, "Covenant No. 7");

5 **WHEREAS**, the parties agree that the version of Department Order 710 published  
6 on June 13, 2017 fully satisfies Covenant Nos. 1 through 7;

7 **WHEREAS**, Plaintiffs contend that they have incurred in excess of \$2,350,000 in  
8 attorneys' fees and costs in litigating this action since its inception, and have incurred in  
9 excess of \$280,000 in attorneys' fees and costs in litigating this action since this Court's  
10 December 22, 2016, Order dismissing Claim One without prejudice (ECF No. 155);

11 **WHEREAS**, the parties agree that, because of the above-described circumstances,  
12 resolution of Claim Six and Claim Seven—without further litigation, without any  
13 admission of liability, and without any final adjudication of any issue of fact or law—is  
14 appropriate and will avoid prolonged and complicated litigation between the parties;

15 **WHEREAS**, the parties intend this Stipulated Settlement Agreement to be  
16 enforceable by, and for the benefit of, not only the Plaintiffs but also all current and future  
17 prisoners sentenced to death in the State of Arizona ("Condemned Prisoner  
18 Beneficiaries"), who are express and intended third-party beneficiaries of this Stipulated  
19 Settlement Agreement and who are entitled to all rights and benefits provided to Plaintiffs  
20 herein, and who, upon any showing that any of the Defendants, any of the Defendants'  
21 successors in their official capacities as representatives of the ADC ("Defendants'  
22 Successors"), or the ADC has violated or intends to violate any of Covenant Nos. 1  
23 through 7 may continue this action as substituted plaintiffs pursuant to Rule 25(c) of the  
24 Federal Rules of Civil Procedure;

25 **WHEREAS**, the parties intend this Stipulated Settlement Agreement to bind  
26 Defendants, the ADC, and Defendants' Successors, who, in the event that any Plaintiff or  
27 Condemned Prisoner Beneficiary moves to reopen this proceeding under Rule 60(b)(6) of  
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1 the Federal Rules of Civil Procedure, will be deemed to have been automatically  
2 substituted as defendants in this action pursuant to Rule 25(d) of the Federal Rules of Civil  
3 Procedure;

4 **WHEREAS**, the parties intend and agree that, upon any breach of this Stipulated  
5 Settlement Agreement, (a) any Plaintiff or Condemned Prisoner Beneficiary has standing  
6 and the right to move to reopen this proceeding under Rule 60(b)(6) of the Federal Rules  
7 of Civil Procedure, and (b) an order shall immediately issue permanently enjoining the  
8 ADC from violating Covenant Nos. 1-7;

9 **WHEREAS**, in the event that any Plaintiff or Condemned Prisoner Beneficiary  
10 moves to reopen this proceeding under Rule 60(b)(6) of the Federal Rules of Civil  
11 Procedure, the parties agree that the Defendants, the ADC, and Defendants' Successors  
12 waive all objections to this Court's reopening of this proceeding, including on the basis of  
13 timing, ripeness, mootness, or the standing of the moving parties;

14 **WHEREAS**, in the event that this Stipulated Settlement Agreement is breached  
15 through an actual or intended violation of any of Covenant Nos. 1 through 7 by  
16 Defendants, Defendants' Successors, or the ADC, and any Plaintiff's or Condemned  
17 Prisoner Beneficiary's motion to reopen this proceeding under Rule 60(b)(6) of the  
18 Federal Rules of Civil Procedure is not granted for reasons related to the moving parties'  
19 standing or the Court's jurisdiction, Defendants, Defendants' Successors, and the ADC  
20 consent to the entry of an order in a separate action by a Plaintiff or a Condemned Prisoner  
21 Beneficiary for breach of this agreement that permanently enjoins Defendants,  
22 Defendants' Successors, and the ADC from engaging in any conduct that violates any of  
23 Covenant Nos. 1 through 7.

24 **IT IS THEREFORE STIPULATED AND AGREED** that:

25 (1) Claims Six and Seven of Plaintiffs' Second Amended Complaint and  
26 Supplemental Complaint are dismissed, without prejudice.

27 (2) The parties do not hereby intend to settle, and Plaintiffs instead expressly  
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1 reserve their right to appeal, other claims that were dismissed by the Court's May 18,  
2 2016, Order, including Claims 3, 4, and 5, which challenge various aspects of the ADC's  
3 execution procedures on First Amendment grounds.

4 (3) Upon any showing by any Plaintiff or Condemned Prisoner Beneficiary that  
5 any of the Defendants, any of the Defendants' Successors, or the ADC intend to engage  
6 in or have actually engaged in any of the following conduct (together, the "Prohibited  
7 Conduct"):

8 (a) adopt language in any future version of the ADC's execution  
9 procedures that purports to disclaim the creation of rights or obligations;

10 (b) grant the ADC and/or the ADC Director the discretion to deviate  
11 from timeframes set forth in the ADC's execution procedures regarding issues that  
12 are central to the execution process, which include but are not limited to those  
13 relating to execution chemicals and dosages, consciousness checks, and access of  
14 the press and counsel to the execution itself;

15 (c) change the quantities or types of chemicals to be used in an execution  
16 after a warrant of execution has been sought without first notifying the condemned  
17 prisoner and his/her counsel of the intended change, withdrawing the existing  
18 warrant of execution, and applying for a new warrant of execution;

19 (d) select for use in an execution any quantity or type of chemical that is  
20 not expressly permitted by the then-current, published execution procedures;

21 (e) fail to provide upon request, within ten (10) calendar days after the  
22 State of Arizona seeks a warrant of execution, a quantitative analysis of any  
23 compounded or non-compounded chemical to be used in an execution that reveals,  
24 at a minimum, the identity and concentration of the compounded or non-  
25 compounded chemicals;

26 (f) use or select for use in an execution any chemicals that have an  
27 expiration or beyond-use date that is before the date that an execution is to be  
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1 carried out; or use or select for use in an execution any chemicals that have an  
2 expiration or beyond-use date listed only as a month and year that is before the  
3 month in which the execution is to be carried out;

4 (g) adopt or use any lethal-injection protocol that uses a paralytic  
5 (including but not limited to vecuronium bromide, pancuronium bromide, and  
6 rocuronium bromide); or

7 (h) adopt any provision in any future version of the ADC's execution  
8 procedures that purports to permit prisoners or their agents to purchase and/or  
9 supply chemicals for use in the prisoner's own execution; then

10 Claims Six and Seven shall be reinstated and reopened pursuant to Rule 60(b)(6) of the  
11 Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties  
12 granted herein, an injunction shall immediately issue in this action or in a separate action  
13 for breach of this Stipulated Settlement Agreement permanently enjoining Defendants,  
14 Defendants' Successors, and the ADC from engaging in any of the Prohibited Conduct.

15 (4) Plaintiffs agree not to seek their attorneys' fees and costs incurred in  
16 litigating Claims Six and Seven unless Defendants, Defendants' Successors, or the ADC  
17 breach this Stipulated Settlement Agreement, in which case Plaintiffs shall be entitled to  
18 an award, either in this action or in a separate action for breach of this Stipulated  
19 Settlement Agreement, of their reasonable attorneys' fees and costs incurred in litigating  
20 this action from its inception through the effective date of this Stipulated Settlement  
21 Agreement, as determined by the Court after briefing by the parties. In that circumstance,

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1 Plaintiffs shall also be entitled to seek to collect their reasonable attorneys' fees and costs  
2 incurred in moving to enforce this Stipulated Settlement Agreement.

3 **IT IS SO STIPULATED.**

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5  
6 Dated: June 21, 2017

Sidley Austin LLP

7 s/ Mark E. Haddad

8 Mark E. Haddad

9 Attorneys for Plaintiffs

10  
11 Dated: June 21, 2017

Office of the Arizona Attorney General

12 s/ Jeffrey L. Sparks

13 Jeffrey L. Sparks

14 Attorneys for Defendants  
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2017, I electronically filed the foregoing **Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claims Six and Seven** by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Barbara Cunningham

Barbara Cunningham

Legal Secretary

# EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

First Amendment Coalition of Arizona, Inc.;  
Charles Michael Hedlund; Graham S. Henry;  
David Gulbrandson; Robert Poyson; Todd  
Smith; Eldon Schurz, and Roger Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC; James  
O’Neil, Warden, ASPC—Eyman; Greg  
Fizer, Warden, ASPC—Florence; and Does  
1-10, Unknown ADC Personnel, in their  
official capacities as Agents of ADC,

Defendants.

No. CV-14-01447-PHX-NVW

**ORDER FOR DISMISSAL OF  
CLAIMS SIX AND SEVEN**

Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, “Plaintiffs”), and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections (“ADC”); James O’Neil, Warden, ASPC—Eyman; and Greg Fizer, Warden, ASPC—Florence (collectively, “Defendants”), have jointly stipulated to dismiss Claims Six and Seven of Plaintiffs’ Second Amended Complaint (ECF Nos. 94 & 97) and Supplemental Complaint (ECF No. 163) (“Claims Six and Seven”), based upon the recitals in the parties’ concurrently filed Stipulated Settlement Agreement for Dismissal of Claims Six and Seven (“Stipulated Settlement Agreement”) (ECF No. 186), and under the terms that follow below.

1           Having considered the parties' Stipulated Settlement Agreement, and good cause  
2 appearing, IT IS HEREBY ORDERED that:

3           (1) Claims Six and Seven of Plaintiffs' Second Amended Complaint and  
4 Supplemental Complaint are dismissed, without prejudice.

5           (2) Upon any showing by any Plaintiff or any other current or future prisoner  
6 sentenced to death in the State of Arizona that any of the Defendants, any of the  
7 Defendants' successors, or the ADC intend to engage in or have actually engaged in any  
8 of the following conduct (together, the "Prohibited Conduct"):

9           (a) adopt language in any future version of the ADC's execution  
10 procedures that purports to disclaim the creation of rights or obligations;

11           (b) grant the ADC and/or the ADC Director the discretion to deviate  
12 from timeframes set forth in the ADC's execution procedures regarding issues that  
13 are central to the execution process, which include but are not limited to those  
14 relating to execution chemicals and dosages, consciousness checks, and access of  
15 the press and counsel to the execution itself;

16           (c) change the quantities or types of chemicals to be used in an  
17 execution after a warrant of execution has been sought without first notifying the  
18 condemned prisoner and his/her counsel of the intended change, withdrawing the  
19 existing warrant of execution, and applying for a new warrant of execution;

20           (d) select for use in an execution any quantity or type of chemical that  
21 is not expressly permitted by the then-current, published execution procedures;

22           (e) fail to provide upon request, within ten calendar days after the State  
23 of Arizona seeks a warrant of execution, a quantitative analysis of any  
24 compounded or non-compounded chemical to be used in an execution that reveals,  
25 at a minimum, the identity and concentration of the compounded or non-  
26 compounded chemicals;

27           (f) use or select for use in an execution any chemicals that have an  
28 expiration or beyond-use date that is before the date that an execution is to be

1 carried out; or use or select for use in an execution any chemicals that have an  
2 expiration or beyond-use date listed only as a month and year that is before the  
3 month in which the execution is to be carried out;

4 (g) adopt or use any lethal-injection protocol that uses a paralytic  
5 (including but not limited to vecuronium bromide, pancuronium bromide, and  
6 rocuronium bromide); or

7 (h) adopt any provision in any future version of the ADC's execution  
8 procedures that purports to permit prisoners or their agents to purchase and/or  
9 supply chemicals for use in the prisoner's own execution; then

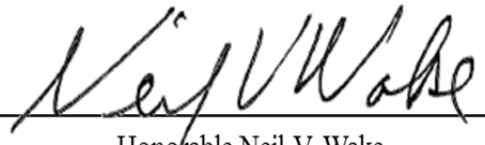
10 Claims Six and Seven shall be reinstated and reopened pursuant to Rule 60(b)(6) of the  
11 Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties  
12 granted in their concurrently filed Stipulated Settlement Agreement, an injunction shall  
13 immediately issue in this action or in a separate action for breach of the parties'  
14 Stipulated Settlement Agreement, permanently enjoining Defendants, Defendants'  
15 successors, and the ADC from engaging in any of the Prohibited Conduct.

16 (3) Plaintiffs shall not be awarded attorneys' fees or costs incurred in litigating  
17 Claims Six and Seven unless Defendants, Defendants' successors, or the ADC breach the  
18 parties' Stipulated Settlement Agreement, in which case Plaintiffs shall be entitled to an  
19 award, either in this action or in a separate action for breach of the parties' Stipulated  
20 Settlement Agreement, of their reasonable attorneys' fees and costs incurred in litigating  
21 this action from its inception through the date of this Order (which currently are in excess  
22 of \$2,630,000), as determined by the Court after briefing by the parties. In that  
23 circumstance, Plaintiffs shall also be entitled to seek to collect their reasonable attorneys'  
24 fees and costs incurred in moving to enforce the parties' Stipulated Settlement Agreement  
25 and this Order.

26 (4) The stay order (Doc. 68) entered November 24, 2014, is vacated.  
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1 With the entry of this Order, all claims of all parties have been disposed of. The  
2 Clerk shall terminate this case.

3 Dated: June 22, 2017.

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6 Honorable Neil V. Wake  
7 Senior United States District Judge  
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